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RE WONG WENG FOO

HIGH COURT MALAYA, KUALA LUMPUR
RAMLY ALI J
[ORIGINATING SUMMONS NO: D5-24-233-2007]
B 28 SEPTEMBER 2007

COMPANY LAW: *Winding up - Liquidator - Powers and duties - Application by liquidator for declaration that company in voluntary liquidation be exempted from appointing Committee of Inspection - Whether court empowered to make such declaration - Whether necessary for smooth performance of liquidator's duties - Companies Act 1965, s. 269(1)(a)*

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This was an application by the liquidator of a company named Taiping Recovery Sdn Bhd (In Liquidation) ('TRSB') for, *inter alia*, a declaration that the appointment of a Committee of Inspection in the winding up affairs of TRSB be dispensed with. The grounds for the application were as follows: (i) the creditors of the company whose proof of debts had been admitted by the former liquidators of the company had all been paid up to the amount admitted; (ii) there were no legal suits or appeals by creditors of the company whose proof of debts were rejected, making their claim time-barred; (iii) the anticipated creditors in respect of whom provisions were previously made had not filed any legal suits in respect of their alleged debt, and their claims had since become time-barred; (iv) the Inland Revenue Board was the only remaining creditor and pending negotiations on the final assessment, the company had made a provision in their accounts for the sum of RM6,978,908.86 to meet the claim in full; (v) the company had no secured creditors; and (vi) in the absence of creditors, there was no need for a Committee of Inspection to be appointed.

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Held (allowing the application):

(1) Even though there are no express provisions in the Companies Act 1965 ('Act') as to whether a company in the circumstances of TRSB is exempted from having to appoint a Committee of Inspection to act with the liquidator in the exercise of some of the liquidator's statutory powers, the court is still empowered to make the declaration sought, which was really necessary and beneficial for the smooth performance of the liquidator's duties in the liquidation process of the company. In the present case, those persons who initiated

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legal suits against the company had not submitted any formal proof of debts to the applicant. Insofar as these litigants were concerned, they were only contingent creditors since the legal suits had not concluded. Rule 125 of the Companies (Winding-up) Rules 1972 provides that contingent creditors are not permitted to vote for a Committee of Inspection at creditors' meetings. The only potential creditor reflected on TRSB's Form 75 as at 28 March 2007 was the assessment of tax by the Inland Revenue Board in the sum of RM6,978,908.86 (currently under dispute). Insofar as this was concerned, the applicant had made a full provision for the same in the company's accounts. In conclusion, although generally a Committee of Inspection is mandatory in cases of liquidation of a company, s. 269(1)(a) of the Act empowers the court to supervise and approve certain powers of a liquidator in a company's liquidation. The present application was an appropriate case where the declaration sought by the applicant should be granted. (paras 20, 23, 24, 25 & 26)

Case(s) referred to:
Hanson v. Radcliffe Urban District Council [1922] 2 Ch 490 ***(refd)***
Ibeneweka v. Egbuna [1964] 1 WLR 219 ***(refd)***
Lim Cho Hock v. Government of the State of Perak, Menteri Besar, State of Perak and President, Municipality of Ipoh [1980] 1 LNS 43 ***(refd)***
Thorne v. Motor Trade Association [1937] AC 797 ***(refd)***

Legislation referred to:
Companies Act 1965, ss. 236(1)(c), (d), 262(1), 269(1)(a)
Companies (Winding-up) Rules 1972, r. 125

For the applicant - Yunis Arliza Abdul Rahim; M/s Sivanathan

Reported by Suresh Nathan

JUDGMENT

Ramly Ali J:

The Application

[1] Enclosure 1 is an application by the Liquidator of Taiping Recovery Sdn Bhd (In Liquidation) ("TRSB") for amongst others, the following relief:

A (a) a declaration that the appointment of a committee of inspection is not mandatory in the case of TRSB; and

(b) alternatively, that the appointment of a further committee of inspection in the winding up affairs of TRSB be dispensed with.

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[2] The grounds for the application are as follows:

(a) the creditors of the company whose proof's of debt had been admitted by the former liquidators of the company have all been paid up to the amount admitted;

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(b) there are no legal suits or appeals by creditors of the company whose proof of debt were rejected. Their claims have since become time-barred;

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(c) the anticipated creditors in respect of whom provisions were previously made have not filed any legal suits in respect of their alleged debt. Their claims have since become time-barred;

(d) the Inland Revenue Board is the only remaining creditor and pending negotiations on the final assessment, the company has made a provision in the accounts for the sum of RM6,978,908.86 to meet the claim in full;

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(e) the company has no secured creditors; and

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(f) in the absence of creditors, there is no need for a committee of inspection to be appointed.

Factual Background

G **[3]** TRSB, until 1999 carried on the business of a stockbroker. On or about February 1999, due to its liabilities, TRSB was put under special administration pursuant to the Pengurusan Danaharta Nasional Berhad Act 1998. Special Administrators were appointed on 12 February 1999.

H **[4]** With the cesser of business and the receipt of RM69 million sale proceeds which were sufficient to pay off TRSB's liabilities, the Special Administrators decided the special administration could come to an end. On 29 Disember 2000, they resolved that TRSB ought to be voluntarily wound up.

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[5] On 29 January 2001, the members of TRSB resolved that TRSB be voluntarily wound up and that Messrs Gan Ah Tee and Ooi Woon Chee be appointed liquidators of TRSB. On the same day, the meeting of the creditors of TRSB resolved to confirm the appointment of Messrs Gan Ah Tee and Ooi Woon Chee as liquidators, and a committee of inspection was also appointed.

[6] The applicant was subsequently appointed as liquidator of TRSB in place of Messrs Gan Ah Tee and Ooi Woon Chee at a meeting of the creditors of TRSB on 28 March 2002.

[7] Liquidation is still ongoing because there are pending legal suits initiated by TRSB to recover debts owed to it.

[8] The declaration or dispensation in the present application is necessary because the Companies Act 1965 is silent as to whether a company in the circumstances of TRSB is exempted from having to appoint a committee of inspection to act with the liquidator in the exercise of some of the liquidator's statutory powers.

[9] The circumstances of TRSB are set out a paras. 11 to 33 of the applicant's affidavit, and can be summarised as follows:

(a) a proof of debt exercise was undertaken by the previous liquidators of TRSB in March 2001, whereby 11 claims amounting to RM33,111,925,53 out of 17 claim submissions were admitted while the rest were rejected;

(b) all of the creditors whose proofs of debt were admitted were paid in full up to the amount admitted;

(c) the claims of the creditors whose proof of debt were rejected have become time-barred or the creditors have amicably settled with TRSB and/or its contributories;

(d) no other creditors have filed their proof of debt since the previous liquidators carried out the proof of debt exercise in March 2001;

(e) a committee of inspection was appointed by the creditors of TRSB in January 2001 to act with the previous liquidators of TRSB in the winding up process of TRSB;

A (f) the committee of inspection resigned between May 2001 and March 2002 once the task of paying off all the admitted creditors was completed; and

(g) since all the creditors have been paid off, there would be
B nothing left to be done by a committee of inspection if such a committee had to still be appointed under the Companies Act 1965.

Provisions In The Companies Act 1965

C **[10]** Section 269(1)(a) of the Companies Act 1965 provides that where a company is under a creditor's voluntary winding up, a liquidator is to exercise certain powers with the approval of either the court or a committee of inspection. One of these powers is the power to compromise with debtors and creditors under
D s. 236(1)(c) and (d) of the Companies Act 1965 which provides:

> (1) The liquidator may with the authority either of the Court or the Committee of Inspection:
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> (c) make any compromise or arrangement with creditors or
> E persons claiming to be creditors or having or alleging themselves to have any claim present or future certain or contingent ascertained or sounding only in damages against the company **or whereby the company may be rendered liable;**
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> (d) compromise any calls and liabilities to calls debts and liabilities capable of resulting in debts and any claims present or future certain or contingent ascertained or sounding only in damages subsisting or supposed to subsist between the company and a contributory or other
> G debtor or person apprehending liability to the company, and all questions in any way relating to or affecting the assets or the winding up of the company, on such terms as are agreed, and take any security for the discharge of any such call, debt, liability or claim and give a complete discharge in respect thereof; …
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[11] Thus s. 269(1)(a) of the Companies Act 1965 makes it clear that in the absence of Court approval, the liquidator must act with the approval of a committee of inspection in exercising the powers listed in s. 236(1)(c) and (d) of the Companies Act 1965.

I **[12]** Section 262(1) of the Companies Act 1965 then specifies how a committee of Inspection maybe appointed in a creditor's voluntary winding up:

(1) The creditors at the meeting summoned pursuant to section 259 or 260 or at any subsequent meeting may, if they think fit, appoint a committee of inspection consisting of not more than five persons, whether creditors or not and if such a committee is appointed the company may, either at the meeting at which the resolution for voluntary winding up is passed or at any time subsequently in general meeting, appoint such number of persons but not more than five as it thinks fit to act as members of the Committee.

[13] Section 262(1) of the Companies Act 1965 envisages the existence of creditors in the first place, to appoint a committee of inspection. The section and indeed the entire Companies Act 1965 is silent as to how a committee of inspection is to be appointed in cases where a company under liquidation has no creditors.

[14] Whilst TRSB has no creditors, the applicant nevertheless has to carry out certain duties under section 236(1)(c) and (d) of the Companies Act 1965. For example, he has had to consider compromises *vis-a-vis* judgment debtors, which fall within the ambit of s. 236(1)(d) of the Companies Act 1965.

[15] Since s. 269(1)(a) of the Companies Act 1965 makes it mandatory for the liquidator to act with the approval of the court or a committee of inspection on this issue, and there is no provision in the Act exempting the appointment of a committee of inspection in the case of a company without creditors, TRSB is left in a situation whereby the applicant would have to seek the court's approval on each and every act he does in performance of his duties under s. 236(1)(c) and (d) of the Companies Act 1965.

[16] This would be burdensome to the court and make it impossible for the applicant to carry out the stated duties. It was never intended for the court to be burdened with the everyday liquidation process and for this reason a committee of inspection was conceptualised to assist or approve the liquidator in his decisions.

[17] Since the Act is silent on the requirement of a committee of inspection in the case of companies like TRSB, the court apprehends that a potential creditor may in the future question the applicant's exercise of the powers conferred under s. 236(1)(c) and (d) of the Companies Act 1965 on the basis that there was no committee of inspection appointed.

[18] In this regard, the court is of the view that the issue involved in the present case is not merely theoretical by virtue of the fact that there is no dispute in existence as at this stage. The applicant's apprehension of being in breach of any statutory requirement is real, and the issue is therefore not merely abstract but is of practical importance to a person in the position of the applicant. The court is vested with a discretionary power to grant the declaratory relief sought notwithstanding the theoretical nature of the issue involved.

[19] Whether a declaratory order (as in the present application) should be made is in any case a matter of the court's discretion. The court must take into consideration the practical importance of the order sought. Any way, the general supervision of company's liquidation is still with the court. In this respect the court adopt the statements of Lord Wright in the case of *Thorne v. Motor Trade Association* [1937] AC 797 (at p. 813) where he said:

> I have had some doubts whether this action is one in which declaratory relief should be granted. But the questions are not merely abstract, but are of practical importance to persons in the position of the appellant and on the whole I think this House should not refuse to entertain the appeal.

[20] Even though there is no express provisions in the Companies Act 1965 as to whether a company in the circumstances of TRSB is exempted from having to appoint a committee of inspection to act with the liquidator in the exercise of some of the liquidator's statutory powers, the court is still empowered to make the declaration sought which is really necessary and beneficial for the smooth performance of the liquidator's duties in the liquidation process of the company. This is in line with what Lord Sterndale MR said in the case of *Hanson v. Radcliffe Urban District Council* [1922] 2 Ch 490 (at p. 507): "The power of the court to make a declaration ... is now almost unlimited; I might say only limited by its own discretion".

[21] This principle was affirmed by the Privy Council in *Ibeneweka v. Egbuna* [1964] 1 WLR 219, 225 where Viscount Radcliffe said (at p. 225): "... the power to grant a declaration should be exercised with a proper sense of responsibility and a full realisation that judicial pronouncements ought not to be issued unless there are circumstances that call for their making. Beyond that there is no legal restriction on the award of – declaration."

[22] The above principle was also adopted by Abdoocader J, in *Lim Cho Hock v. Government of the State of Perak, Menteri Besar, State of Perak and President, Municipality of Ipoh* [1980] 1 LNS 43, where he stated:

> Although the fact that the issue in respect of which a declaration is ought is theoretical does furnish the Court with a discretionary ground for refusing relief, the Court has jurisdiction even in such cases to grant a declaration and will in certain circumstance exercise such discretion notwithstanding the theoretical nature of the issue involved.

[23] Those persons in the present case who initiated legal suits against the company have not submitted any formal proof of debt to the applicant. The court is of the view that insofar as these litigants are concerned, they are contingent creditors only since the legal suits have not concluded. Rule 125 of the Companies (Winding Up) Rules 1972 provides that contingent creditors are not permitted to vote for a committee of inspection at creditor's meetings.

[24] The only potential creditor reflected on TRSB's Form 75 as at 28 March 2007 is the assessment of tax by the Inland Revenue Board in the sum of RM6,978,908.86 (currently under dispute). Insofar as this is concerned, the applicant has made a full provision for the same in the company's accounts.

Conclusion

[25] Generally, a committee of inspection is mandatory in cases of company's liquidation. However s. 269(1)(a) of the Companies Act 1965 empowers the court to supervise and approve certain powers of a liquidator in company's liquidation.

[26] In the present application, based on the above considerations, the court feels that this is an appropriate case where the declaration sought by the applicant should be granted. Therefore, the court makes an order as prayed in prayer 2 of encl. 1, for the dispensation of the requirement of a committee of inspection.